Appellants' Petition for Rehearing

United States Court of Appeals

For the Ninth Circuit

No. 15,293

CEDAR CREEK OIL AND GAS COMPANY, a corporation, INTERNATIONAL TRUST COMPANY, a corporation, H. C. SMITH, SUSAN M. WIGHT and W. B. HANEY,

Appellants,

vs.

FIDELITY GAS COMPANY, a corporation, MONTANA-DAKOTA UTILITIES COMPANY, a corporation, and SHELL OIL COMPANY, a corporation,

Appellees.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT:

By its Opinion of October 22nd, 1957, the Court affirmed the judgment of the District Court of the Montana District in granting judgment for the appellees on the grounds of estoppel, laches and waiver. In justice to appellants, and before they are finally deprived of their rights, this Court is petitioned to grant a rehearing so that full consideration may be given to the following points:

(1) By affirming a finding that appellants are estopped, this Court has shifted the burden of proof from appellees, who invoked the plea of estoppel, to the appellants.

(2) The Opinion itself demonstrates that appellees failed to sustain the burden of proving the existence of all of the elements of estoppel by proof, clear, convincing and satisfactory.

(3) The Opinion itself demonstrates that the holding of the Court results from applying every presumption against appellants and for the appellees on the application of the doctrine of estoppel contrary to the law. The Opinion itself demonstrates that the holding that appellants are estopped is based on conjecture and surmise, and there is direct, positive testimony negativing the existence of the elements of the estoppel.

(4) The Opinion itself demonstrates that estoppel has been applied not in the furtherance of justice, but as a sword, in an assault upon the rights of the appellants.

(5) By its Opinion the Court has extended the benefit of its holding of an estoppel to appellees, Montana-Dakota Utilities Company and Fidelity Gas Company even though the Court found that the essential elements of misrepresentation and concealment and reliance were not present so far as those appellees are concerned.

(6) The Opinion itself shows that the Court ignored the rules applicable to oil and gas leases that forfeitures are favored with the result that by its holding the Court has determined that the appellees have kept in force an unexecuted profitless oil and gas lease for a period of 17 years.

(7) The Lower Court decided the case upon the question of estoppel, laches and waiver. By its Opinion, this Court has assumed to pass on the merits of the cause.

(8) Justice requires that a rehearing be granted and that the decision of the Trial Court be reversed.

DISCUSSION

Appellants entered this case armed with a number of legal doctrines which gave to them certain most valuable advantages. Appellees pleaded an estoppel. Under that plea, appellees assumed the burden of proof under prior decisions. We thought appellees would have to prove every element of an estoppel by evidence, clear, convincing and satisfactry. Realizing that the Courts have always held that estoppels are odious and will be applied for only the most impelling reason, we were confident upon the trial

and upon the appeal that the Court would reject the plea, for we assert that appellees completely failed to carry the burden on any one of the elements.

Under the Court's Opinion, instead of the favored position granted us under the laws as it had heretofore existed, the burden was shifted to us, and we were held to be estopped. If there is any doubt as to the correctness of this statement, it is resolved by the following language of the Court which is typical of its treatment of all the issues. Bearing in mind the rule that to support an estoppel the proof must be clear and convincing, the Court, in finding reliance at page 12 of its Opinion says:

> "Here, the circumstantial evidence *tending to prove* reliance as accepted by the trial court and reflected in the findings of fact summarized below, is ample." (Emphasis supplied.)

By this Court's own words, the circumstantial proof of reliance only *tended* to prove reliance.

The burden of proving reliance was upon appellees, yet not one witness was called to present affirmative evidence of reliance. Such testimony need not have consisted only of self serving declarations, but certainly a simple direct statement by an officer of Shell would have been entitled to great weight. Absence of such a statement raises the inference that it was not made because it couldn't be. A conclusion that there was proof of reliance, clear, convincing and satisfactory, does violence to every accepted concept of the application of the doctrine of estoppel.

Under the law, as it was when this case was started, the rule was that forfeitures of oil and gas leases were favored, but in this case, every presumption was indulged against that rule and a lease under which no payment has been made, and under which no money has been expended for 17 years, is held to be effective.

The writer of this brief served for six years as a member of an Appellate Court and knows the reluctance of the Courts to grant rehearings. He earnestly submits, however, that in this case, the facts demand the granting of the relief and he is confident the Court will give to the Petition the most serious consideration.

THE DOCTRINE OF ESTOPPEL IS APPLIED ONLY TO PROMOTE THE ENDS OF JUSTICE

The first principle applicable to estoppels is that the remedy is always applied so as to promote the ends of justice. It is available only for protection and cannot be used as a weapon of assault. *Dickenson vs. Colgove, 100 U. S. 578, 25 L. Ed. 618.* The inquiry here is the same as that stated in *IXL Stores Co. vs. Success Markets, ... Utah ....., 97 Pac. (2d) 577:*

> "Was the change of position sufficient to warrant the application of the doctrine of equitable estoppel or would its application in the present case be more in the nature of a sword cutting off the rights of the lessor * * * ?"

The record here shows that all the agreements between appellants and appellees Montana-Dakota Utilities and

Fidelity were made under conditions that gave Montana-Dakota and Fidelity unconscionable advantage over appellants. Exhibit 36 demonstrates and confirms the testimony of H. C. Smith, Wight and others that appellants' substantial gas production has been taken for twenty-five years with no real returns to appellants. The individual appellants and officers of the corporate appellants are old men. Their investments in lands and leases have, under the kindly administration of Montana-Dakota yielded only the bitter fruit of disappointment. They know if the Court adheres to its views, none of them will live to see a single payment of royalty or anything else under the Fidelity Agreement. If it were otherwise, would they now be fighting the power of the great corporations, Shell and Montana-Dakota Utilities? Bitter experience has been their teacher. They know if they now lose, their dreams of 30 years ago will be forever dust. Truly here estoppel has become the ultimate weapon of assult.

Appellees admitted that from 1938 on, neither Montana-Dakota Utilities nor Fidelity Gas spent one cent on geophysical work, drilling or development of the lower sands. The Court did not find that either the Husky or Carter drilling 35 miles from appellants' lands was drilling under the Fidelity agreement and, of course, no such conclusion could be justified.

Are the ends of justice served by applying the doctrine of estoppel so that these leases have been kept alive for nearly 20 years without expenditure by Montana-Dakota Utilities

or Fidelity of one cent? The question answers itself. Compare *Sauder vs. Midcontinent Petroleum Company, 292 U. S. 272, 54 S. Ct. 671.*

The first principle of the doctrine requires rejection of estoppel in this cause.

THE BURDEN OF PROVING EACH OF THE ELEMENTS OF AN ESTOPPEL IS UPON APPELLEES, AND THE PROOF MUST BE BY EVIDENCE CLEAR, CONVINCING AND SATISFACTORY

In its Opinion this Court said:

> "If appellants are correct as to any one of these elements of estoppel, the judgment cannot stand since all five elements must be found to exist. Gerard vs. Sanner, 110 Mont. 71, 103 Pac. (2d) 314. The burden of proving each of these elements is upon appellees, Waddell vs. School District No. 2, supra, and such proof must be by *clear, convincing and satisfactory evidence.* Fiers vs. Jacobson, 123 Mont. 242, 211 Pac. (2d) 968." (Emphasis supplied.)

In amplification of this rule, the Courts have indicated how clear, convincing and satisfying the evidence must be to establish an estoppel, by saying over and over again that "Estoppels are odious, * * *." *Fiers vs. Jacobson, supra.* The Courts have repeatedly held that proof clear, convincing and satisfactory requires something more than a mere preponderance of evidence. It is proof to a moral certainly, not just a slight tipping of the scales. *Dewey vs. Spring Valley Land Co., 73 N. W. 565, 98 Wis. 83, Cross*

vs. Ledford, 120 N. E. (2d), 161 Ohio St. 469. With these rules in mind, we turn to a consideration of the sufficiency of the proof to establish by proof clear, convincing and satisfactory the elements of the estoppel found to exist.

In its Opinion, this Court quoted with approval from *Gypsy Oil Company vs. Marsh, 121 Okla. 135, 248 Pac. 329,* and accepted the definition of the five essential elements of estoppel, (1) False representation or concealment; (2) Knowledge, actual or constructive of the real facts; (3) Lack of knowledge or means of knowledge of the real fact on the part of the party claiming the estoppel; (4) Intention that the concealment or misrepresentation be acted upon; (5) Reliance upon the misrepresentation or concealment to the prejudice of the one claiming the estoppel.

THERE IS ABSOLUTELY NO PROOF OF MISREPRESENTATION OR CONCEALMENT OF FACTS WITH THE INTENT ON THE PART OF THE APPELLANTS TO MISLEAD APPELLEES.

We respectfully ask the Court to re-read its Opinion beginning with the fourth paragraph at page 7 through the second paragraph on page 9, and ask whether what is there set out indicates to a reader of the opinion in any manner that appellees sustained the burden of showing by evidence, *clear, convincing and satisfactory* that appellants concealed or misrepresented the facts. This language of the Court itself demonstrates better than could any argument on appellant's part that the holding of the Court that appel-

lees are guilty of deliberate misrepresentation or concealment can be based only on "mere conjecture" and "by argument, inference or intendment" contrary to the law universally applied and as stated in *31 C. J. S. 457.*

This language shows that the Court, contrary to every decision that we have been able to find and contrary to its own pronouncement in the second paragraph of page 7 of the Opinion, has shifted the burden of proof to appellants to show there was no concealment or misrepresentation. Mere inaction or silence will not establish an estoppel. Under the record here, had we offered no proof as to any knowledge or any notice or any action on our part from April 21st, 1951, to December 3rd, 1952, when the suit was instituted, the appellees would have failed to establish by proof, *clear, convincing and satisfactory* that appellants *deliberately concealed* or *misrepresented* the facts from any one of the appellees.

But appellants did not do this. Instead, appellants introduced testimony as to conversations between representatives of the appellants and an agent of appellee Shell. Granting that the testimony of Wight as to dates was unclear, the fact remains that the conversations took place sometime prior to the filing of the suit and perhaps even prior to the making of the agreement between Shell and Montana-Dakota Utilities and Fidelity Gas. If Wight had intended to conceal the facts, would he have offered to lease the lands to Shell? The word "conceal" means to hide, to cover up and to establish concealment. The appellees

had to prove the hiding, the covering up. Where is the concealment here? It does not exist.

But this was not all. On July 16th, 1951, not more than seven weeks after the letter of April 21st, 1951 was received, appellant H. C. Smith wrote his letter of July 16th, 1951. (Exhibit 30). It makes no difference as to the first element—the intentional concealment or misrepresentation—whether Shell received this letter or not, although the Court's conclusions that it had not is startling in the light of the record and in the light of the Court's own comment as to the reply of Montana-Dakota Utilities which on its face shows that a copy of the letter had been sent to appellee Shell. The letter of H. C. Smith was not a concealment of facts or a misrepresentation of facts, but it was an assertion of the very claim made in the principal suit. The Court does not suggest that a delay of seven weeks in asserting his claim would be a delay sufficient to estop appellant Smith. We cannot believe that the Court can adhere to its determination that appellant Smith was guilty of concealment or misrepresentation.

What is true of the letter of H. C. Smith is true also of the letter of appellant Cedar Creek of September 12th, 1952. (Exhibit 37). It is true that this latter letter may have been late in time, but it was sent some months prior to the filing of the suit and in the light of this record, with no drilling within 35 miles of the area involved, at the time the letter of the 12th was sent, and in the light of the decision, the delay was not an unreasonable one.

Whether it was or not, the sending of the letter negatives completely the *intentional concealment* or misrepresentation of facts on the part of Cedar Creek.

A re-reading of our briefs indicates that appellants may not have sufficiently emphasized this first element of an estoppel, particularly the requirement that proof of this first element of concealment and misrepresentation must show a *deliberate* intent on the part of the appellants to conceal or misrepresent.

We did cite the Montana statute, however, that statute succinctly stating the rule announced by every Court in every jurisdiction. The applicable provision of the Montana statute, *Section 93-1301-6, Subsection 3, R. C. M. 1947,* reads:

> "Whenever a party has by his own declaration, act or ommission, *intentionally and deliberately* led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or ommission, be permitted to falsify." (Emphasis supplied)

It is not enough that the one claiming the estoppel was misled, and we deny emphatically that the proof here supports any conclusion that any of the appellees were misled, there must have been proven an *intent* on the part of the one claimed to be estopped to mislead.

The rule is aptly stated in *Scott vs. Jardine Gold Mining & Milling Company, 79 Mont. 485, 495, 257 Pac. 406*:

"Mere silence cannot work an estoppel. To be effective for this purpose, the person to be estopped must have had *an intent* to mislead or a willingness that another should be deceived, and the other must have been misled by the silence. 10 R. C. L. 693; Moore vs. Sherman, supra. An estoppel in pias never takes place where one party did not *intend* to mislead and the other is not actually misled." (Emphasis Supplied)

There being absent here completely any proof of concealment or misrepresentation with the intent to mislead, there can be no estoppel.

APPELLEES DID NOT PROVE BY CLEAR, CONVINCING AND SATISFACTORY EVIDENCE ELEMENT NUMBER 3 THAT ANY OF THE APPELLANTS WAS WITHOUT KNOWLEDGE OR MEANS OF KNOWLEDGE OF THE FACT THAT APPELLANTS CLAIMED THE FIDELITY AGREEMENTS WERE TERMINATED

By its opinion the Court concluded that appellees, Montana-Dakota Utilities and Fidelity Gas had knowledge of the real facts. In that situation, certainly there could be no estoppel as to those appellees. The Court concludes that since Shell itself did not receive a reply to a letter, that of April 21st, 1951, from Montana-Dakota Utilities to these appellants, it had no duty to make any inquiry as to the status of the title to the lands here involved. Appellants owed no duty to communicate with Shell at all. Their obligations were to Montana-Dakota Utilities and Fidelity

Gas, and the letter of H. C. Smith dated July 16th, 1951, put Montana-Dakota Utilities and Fidelity Gas on inquiry. Montana-Dakota answered Smith's cancellation notice by letter dated August 9th, 1951. In its footnote, the Court said:

> "This letter carries a notation at the bottom that a copy was to be sent to Shell Oil Company, Mr. Armin Johnson. The record is silent as to whether this was actually done."

Certainly this notation indicates that the universal practice of lawyers and the business world to show on letters by similar notations that copies had been sent to those indicated, raises the presumption that what is noted is actually carried out. Once that letter was introduced, *without objection,* and without any testimony on the part of appellee to negative its receipt by Shell, the only conclusion allowable is that Shell did receive the Montana-Dakota Utilities' letter to H. C. Smith (Exhibit 31), which shows on its face that appellant H. C. Smith at least, was then claiming that the Fidelity agreement was dead. It takes no evidence to establish that in the ordinary course of business, a copy of a letter is sent as indicated by the notation appearing on it, and the presumption is "That the ordinary course of business has been followed." *Section 93-1301-7, Subsection 20, R. C. M. 1947.*

This is particularly true here where appellees introduced no testimony that Shell actually had no knowledge of appellants' claims. A holding of lack of knowledge has to

rest on a presumption, on argument, on speculation, all of which disappears in the face of Exhibit 37.

We again call the Court's attention to the language of Exhibit 5, the agreement between Montana-Dakota Utilities and Fidelity with Shell. Montana-Dakota Utilities and Fidelity solemnly agreed to notify Shell of claims of title defects. What justification is there to assume that that pledge was not kept?

While we had no burden to prove knowledge of our claims long prior to the filing of the suit, the record contains a prima facie showing of actual knowledge by Shell, as well as by Montana-Dakota Utilities and Fidelity. The appellees have failed to prove element Number 2.

THE APPELLEES DID NOT PROVE BY EVIDENCE CLEAR, CONVINCING AND SATISFACTORY THAT SHELL RELIED ON A BELIEF THAT APPELLANTS WERE NOT CLAIMING THE FIDELITY AGREEMENT HAD TERMINATED

The most glaring failure of the appellants to prove the elements of estoppel is the case of the fifth element, reliance, and action to the prejudice of any of the appellees. By the Court's own language, the evidence of reliance is circumstantial only, and the most the Court can say for it is that it is ample to *tend* to prove reliance. The Court misread the record when it found, as it did on page 12,

that the evidence ". . . establishes the Ceder Creek Anticline to the single geological structure * * *." There is no such evidence. The witness DeWolf testified that as to the upper horizons above 2,500 feet, it was a single geological structure. The witness Barnes was called to prove that it was a single structure as to the lower sands, but because of his refusal to submit for examination the data upon which he based his opinion, and upon objection of appellants, he was not permitted to so testify. (Tr. 687) That it is not a single geological structure insofar as the lower sands are concerned is affirmatively established by the fact that dry holes were drilled between Unit 5 and the Little Beaver to the south, and between Unit 5 in the Cabin Creek area to the north. The record simply does not support the Court's conclusion that the anticline is a single geological structure insofar as it applies to the lower sands.

Bearing in mind that estoppels are odious, that the burden of proof should have been on appellees, we ask the Court to re-examine its language in the last full paragraph on page 12.

We respectfully submit that this language of the Court itself shows conclusively that it is only by shifting the burden of proof to appellants and indulging every presumption against appellants and only then by conjecture can the Court find proof of reliance.

As to a determination that the circumstantial evidence establishes the reliance, as a general rule, circumstantial

evidence may be relied upon only where direct evidence is lacking, or to corroborate direct evidence. Appellees made no showing why direct evidence of reliance was not introduced. Obviously it was available. As we urge in the briefs, we urge again now that failure to introduce that direct evidence can be explained only upon a belief on the part of appellees that the direct evidence would not support their position on the estoppel. Had the Court been guided by a belief that estoppels are odious, and are applied only where the proof is clear, convincing and satisfactory, we do not believe it could have held the circumstantial evidence sufficient to establish reliance on the part of Shell. Certainly the circumstantial evidence fails to meet the test as stated in *Scarborough vs. Aero service, 155 Neb. 749, 53 N. W. (2d) 902, 30 A. L. R. (2d) 1159* where the Court said:

> "In addition to direct evidence, or in the absence of the same, circumstantial evidence can be sufficient to sustain a verdict depending solely thereon for support if the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom."

Here Shell had entered into the agreement, Exhibit 5, under which it bound itself to do all of the drilling that it did prior to the time of the suit. All of the drilling performed prior to the institution of the suit was many miles remote from the lands here involved. These lands represented less than three percent of the total acreage involved. There was no proof that any geophysical work

had been done upon the lands of the appellants. The circumstances were as consistent with non-reliance as with reliance. Under the law the circumstantial evidence could not be a basis for a determination of reliance. Certainly it falls far short of proof, clear, convincing and satisfactory of reliance. If we grant that the circumstantial evidence, and we do not grant it, *tends* to show reliance, can the Court be satisfied that the appellees bore the burden of proof required?

Reliance is further negated by the testimony of Cecil Smith that the dry hole in Unit 5, the Warren Well, tended to condemn the area, (Tr. 610, 611, 612) and that prospects for oil were better in Units 8A and 8B. At the time of the agreement, Exhibit 5, prospects were not good for oil in Unit 5 and the drilling prior to the trial and no one disproved that view.

And where is the proof clear, convincing and satisfactory that Shell acted to its prejudice because it thought these leases were still alive? Did anyone testify Shell would not have proceeded with its drilling program it bound itself to perform under its agreement with Montana-Dakota and Fidelity if it knew of appellants' claims? Do any circumstances support such an inference? Filing of this suit did not stop their program. The only proof that would satisfy their burden would be testimony that had appellants promptly asserted their claim—and we assert they did—Shell

would not have carried out its obligations under the contract. Exhibit 5. The suggestion is ridiculous.

We earnestly believe that had the Court duly considered the agreement, Exhibit 5, its decision would have been otherwise.

We recognize the difficulty in writing opinions that will sufficiently set out the salient facts. Here the record was long and the facts somewhat complicated and, therefore, the difficulty was greater than usual, but this Opinion omits reference to certain facts in addition to some errors of fact, that make the decision even more untenable.

As we have pointed out, the statement that this is all one geological structure finds no support in the record. In the light of the many decisions in our reply brief, the mistake as to the date of the filing of suit is most significant. The suit was filed December 3rd, 1952, not on February 2, 1953. A further statement which we believe finds no support in the record is that Shell spent $12,000,000.00 in conducting the program contemplated by the Fidelity Operating Agreements. Exhibit 60 shows that 28 of the 53 wells drilled are in Townships 11 and 12, entirely outside the area contemplated by the Fidelity Operating Agreements, and that nearly $6,000,000.00 of $12,000,000.00 was spent on these wells.

We believe too that an understanding of the significance of the Court's Opinion cannot be reached without knowledge of the provisions of the Montana-Dakota Utilities,

Fidelity, Shell Agreement, Exhibit 5. That agreement shows the true basis for Shell's drilling program and that agreement conclusively negates the reliance found to exist. By paragraph 3 of the Agreement, Shell agreed to commence a well in Townships 11 or 12 at once. This it obligated itself to do no matter what the condition of the titles.

Other provisions deal with the result of failure of specific titles, further drilling and so forth, and all show how unreasonable it is to assume the failure of title to any specific title would have changed Shell's plans one iota. Most significant is the language of paragraph 5 requiring Shell to drill somewhere south of the north line of Township 8 within 2 years. By the agreement itself, neither party contemplated drilling anywhere near Unit 5 until five months after this suit was brought.

THE RECORD DOES NOT SUPPORT THE HOLDING OF THE COURT THAT THE APPELLANTS SHOULD NOT PREVAIL ON THE MERITS

Upon the trial, appellants insisted that by the language of the Operating Agreement itself, and particularly paragraphs 3 and 4 thereof, appellees Montana-Dakota Utilities and Fidelity Gas had failed to exercise the option which would keep the leases alive. We felt that there might be ambiguity in these provisions of the contract and, therefore,

offered testimony as to the circumstances under which the contract was negotiated. (Tr. 253, 254, 255, 290, 291, 292, 293, 294, Appellants' Brief 66, 67, 68, 69.) Our offers of proof establish that the parties fully understood that paragraph 4 established a time limit within which the option could be exercised. Under the authorities cited in our brief, and particularly *Brown vs. Homestake Exploration Company, 98 Mont. 305, 39 Pac. (2d) 168* and *Ming vs. Pratt, 22 Mont. 262, 36 Pac. 279* it was error for the Court to exclude the testimony. This Court, in its Opinion, made no reference to those decisions nor did it make any reference to the many cases cited wherein the Courts have repeatedly held that forfeitures of oil and gas leases are favored. Neither is there any discussion in the Opinion of the authorities appearing in our brief requiring that all ambiguities in contracts be resolved against the scrivener and in the case of oil and gas leases, against the lessee.

A tremendously complicated case with a record of more than 700 pages is disposed of on its merits in two short paragraphs. They represent a sort of slamming of the door in appellants' faces after they have been thrown out by the holding of the Court as to estoppel. We believe had the holding on estoppel been to the contrary, the Court would have given greater consideration to the merits of the cause and that had the Court given that consideration, the holding would have been for the appellants on the merits.

We urge that no evidence is necessary to establish that a delay of 17 years is not good field practice, particularly in the light of the provisions of paragraph 3 of the contract. The delay alone is sufficient to establish a prima facie case for the appellants. In any event, Judge Murray tried the case and heard the evidence. He determined, as a part of his judgment, as stated in his Memorandum, that appellants were entitled to present evidence as to what constitutes good practice in the event his holding on estoppel, laches and waiver was erroneous. That ruling, of course, was based on a desire on his part to do justice. It seems to appellants his view is entitled to consideration and that it was not clearly erroneous, and in the event the Court grants a rehearing as to the estoppel, and in the event it does not determine that the contract itself fixes the time limit in the exercise of the option, then the cause should be returned to the District Court for the taking of additional testimony.

CONCLUSION

There are not many ways of saying black is black and white is white, and for that reason this Petition for Rehearing must, of necessity, repeat some of the argument appearing in appellants' brief. We most earnestly urge, however, that the ruling of the Court as to the estoppel results in white becoming black and black becoming white. We respectfully submit that appellees failed to prove the essential elements of an estoppel by evidence clear, convincing

and satisfactory or at all, and that the Court's decision results in the doctrine of estoppel being used as a sword and not as a shield to prevent injustice. We respectfully urge that this Petition for Rehearing be granted.

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